139-612

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 880.

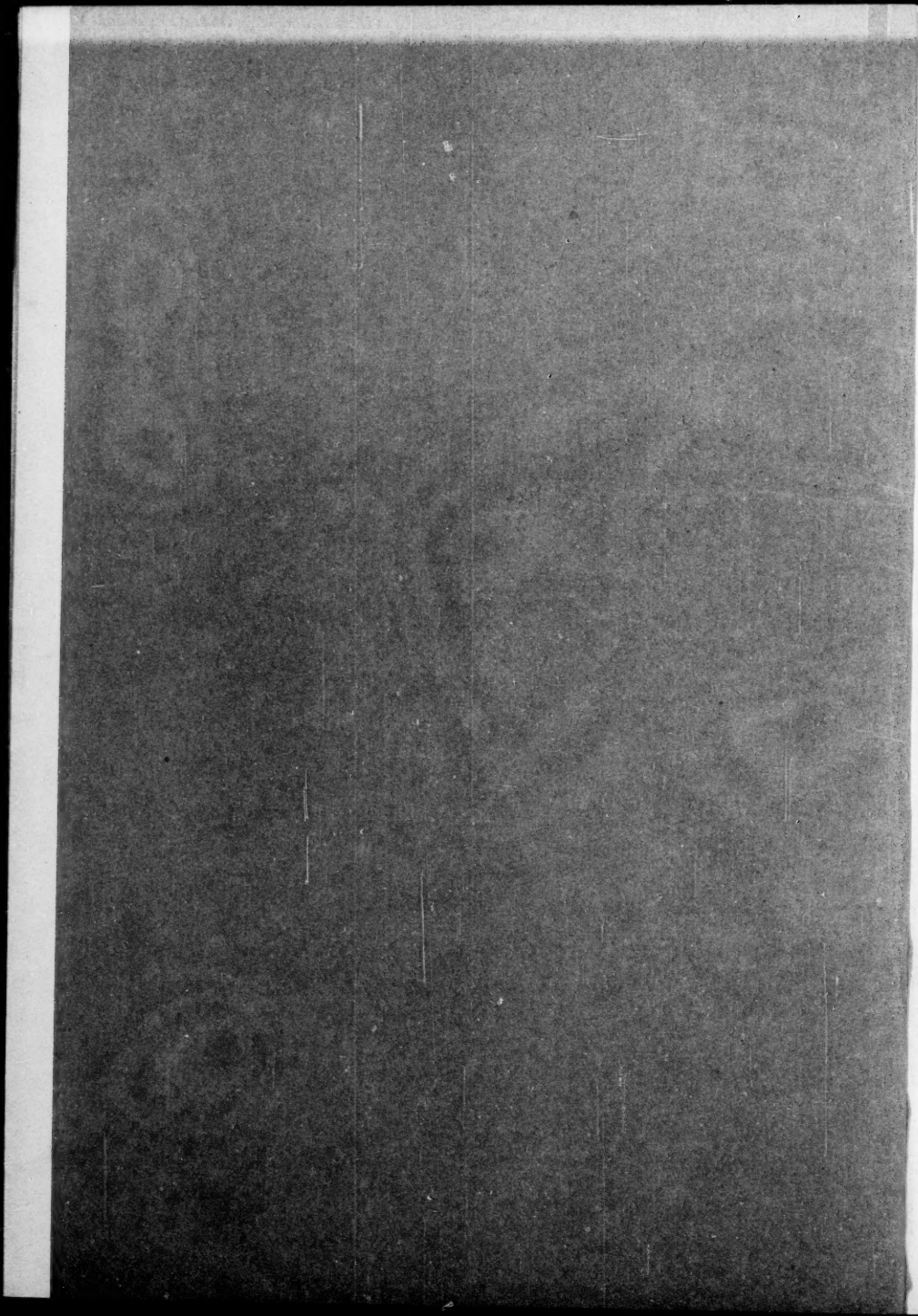
DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

EDWARD LUCKEMEYER, CARL SCHEFER, AND WILLIAM SCHRAMM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 1, 1889.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you between Edward Luckemeyer, Carl Schefer, and William Schramm, plaintiffs, Daniel Magone, defendant, a manifest error hath happened to the great damage of said Daniel Magone, plaintiff in error, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-nine, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-seven, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Daniel Magone, plaintiff in error, against Edward Luckemeyer, Carl Schefer, and William Schramm, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed:) E. & A. A., 814. 2292. U. S. Supreme Court. Daniel Magone, plaintiff in error, against Edward Luckemeyer & al., defendants in error. Writ of error. Stephen A. Walker, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within writ of error is

hereby admitted this 5th day of April, 1889. , attorney for defendants in error. Acopy of the within paper has been this day received at this office. Apr. 5, 1889. Bangs, Stetson, Tracy & MacVeagh, No. 45 William street, New York. Circuit court. Filed Apr. 5, 1889. John A. Shields, clerk.

3 Circuit court of the United States of America for the southern district of New York, in the second circuit.

To the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Daniel Magone, petitioner and affiant, respectfully showeth that he was, prior to the commencement of the suit hereinafter referred to, collector of the customs for the port and district of the city of New York, duly appointed according to law, and that on or about the 5th day of April, 1888, a suit was commenced against him by Edward Luckemeyer, Carl Schefer, and William Schramm, in the supreme court of the State of New York, for or on account of acts done by him under the revenue laws of the United States, and as such collector, and that he has been served with process in said suit in said southern district, and that no trial has been had in said cause.

He therefore prays that in pursuance of the act of Congress, in such case made and provided, the said cause so commenced in the said supreme court may be removed therefrom and entered on the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court.

4 And he will ever pray, etc.

And being duly sworn, deposes and says that the matters hereinbefore set forth are true, to the best of his knowledge, information, and belief.

D. MAGONE.

Sworn to before me this 7th day of April, A. D. 1888.

EDW. HILLIER,
Notary Public, County N. Y.

I certify that, as counsel for the petitioner, I have examined into the proceedings against him, and have carefully inquired into all the matters set forth in the within petition and affidavit, and that I believe the same to be true.

New York, April 21, 1888.

STEPHEN A. WALKER,
U. S. Attorney, Counsellor of the said Circuit Court.

(Endorsed): 12292, U. S. circuit court. Edward Luckemeyer et al. vs. Daniel Magone, collector of customs at the port of New York. Petition to remove cause. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Apr. 23, 1888. Timothy Griffith, clerk.

5 The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United State for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Daniel Magone, defendant, by Edward Luckenmeyer et al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 30th day of April, 1888, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with the writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 23rd day of April, in the year one thousand eight hundred and eighty-eight

[SEAL.] TIMOTHY GRIFFITH,
Clerk.
STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 I have this day personally served upon the clerk of the supreme court of the State of New York a duplicate of the within writ, at the same time showing the original.

M. T. MCMAHON,
U. S. Marshal.
By B. BURNETT,
Dep. Mar.

Dated N. Y., Ap'l 25, 1888. U. S. marshal's office, S. D. N. Y. Received Apr. 23, 1888.

(Endorsed:) 12292. U. S. circuit court. Edward Luckemeyer et al. versus Daniel Magone. Certiorari. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Apr. 25, 1888. John A. Shields, clerk.

7 New York Supreme court, city and county of New York.

EDWARD LUCKEMEYER, CARL SCHEFER, AND William Schramm *against* DANIEL MAGONE. } Protest No. 34.

The complaint of the plaintiffs, by Bangs, Stetson, Tracy & McVeagh, their attorneys, respectfully shows to this court as follows:

First. In the month of November, 1887, and ever since, the plaintiffs were and now are copartners in trade in the city of New York, under the firm name of Luckemeyer, Schefer & Co., and as such duly imported at the port of New York, on the third day of October, 1887, and entered

at said port on the fourth day of November, 1887, eight cases of dress goods composed of wool and cotton, described in the bill of particulars marked Schedule A, hereunto annexed, forming part of this complaint.

Second. During the same time the defendant above named was and is collector of customs of the United States at the port of New York.

Third. Upon the before-mentioned entry of the said goods the
8 said defendant, as such collector, in violation of the provisions of the so-called tariff act of March 3, 1883, and particularly in violation of Schedule K and paragraph 365 thereof, did proceed to ascertain and liquidate the duties payable in respect of such goods at and after the rate of nine (9) cents per square yard and forty per centum (40 per centum) ad valorem; and not at the proper rate, viz, five (5) cents per square yard and thirty-five per centum (35 per centum) ad valorem; and thereupon, and in pursuance of such wrongful ascertainment and liquidation of such duties, the said defendant as such collector did wrongfully proceed to exact from these plaintiffs as and for the duties on such goods, and these plaintiffs, in order to obtain the same, were compelled to pay and did pay to the said defendant, as collector, the sum of seven hundred and forty-nine dollars and two cents ($749.02) in excess of the amount required by law.

Fourth. Within ten days after such ascertainment and liquidation of the duties on said goods, and upon the entry thereof, the plaintiffs filed with the defendant a due and timely protest in writing against the defendant's decision exacting such duty, setting forth distinctly and specifically the grounds of their objection thereto.

The paper marked Schedule B, hereunto annexed and forming part of this complaint, is a true copy of the protest delivered to and served upon the defendant on or about the 21st day of December, 1887.

9 Fifth. Simultaneously with such protest the plaintiffs made due and timely appeal, of which a copy is hereto annexed, marked Schedule C, forming part of this complaint, to the Secretary of the Treasury, who has neglected to answer said appeal and more than ninety days has elapsed since said unanswered appeal.

Sixth. The bill of particulars, being Schedule A, hereunto annexed, truly states the date of entry of said importation at the customhouse in New York; the date of payment of duty in excess; of the filing of the said protests; of the appeal to the Secretary of the Treasury, together with the other particulars required by law; all of which acts were by these plaintiffs duly performed.

Seventh. Said sum so exacted as aforesaid by the defendant has never been repaid to these plaintiffs, and is still due and owing to them.

Wherefore these plaintiffs demand judgment against the defendant for seven hundred and forty-nine $\frac{02}{100}$ dollars ($749.02), with interest from December 21st, 1887, together with the costs and disbursements of this action.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for the Plaintiffs, 45 William Street, New York.

10 CITY AND COUNTY OF NEW YORK, *ss:*

Carl Schefer, being duly sworn, deposes and says: I am one of the plaintiffs named in the foregoing complaint; I am acquainted with the

facts therein set forth; and such complaint is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CARL SCHEFER.

Sworn to before me, this 4th day of April, 1888.

[SEAL.] WM. DETERLING,

Notary Public Kings Co., Certificate filed in New York Co.

11 BILL OF PARTICULARS.

Being "Schedule A," referred to in foregoing complaint.

Name of importer, Luckemeyer, Schefer, & Co.
Description of goods, wool & cotton dress goods.
Invoice No., case marks, and Nos., p. 9730, 9731, 9732, 9733, 9734, 9735, 9736, 9738.
Whence imported, Havre.
Name of vessel, La Bretagne.
Date of the invoice, September 17, 1887.
Date of entry at customhouse, November 4, 1887.
Amount of duty illegally exacted, $749.02.
Date of payment of duties in excess, December 21, 1887.
Protest filed, December 21, 1887.
Date of appeal to Secretary of the Treasury, December 21, 1887.
Date of Secretary's decision, none rendered.

12 *"Schedule B," mentioned in the foregoing complaint.*

NEW YORK, *December 21st*, 1887.

To the collector of customs, port of New York:

SIR: We hereby protest against the payment of duty at the rate of nine (9) cents per square yard and 40 per cent. ad valorem (which is the duty provided for all wool dress goods) on our certain lots of merchandise, being cotton and woolen dress goods, imported by us into this port for warehouse per S. S. La Bretagne, which arrived at this port on the 3rd day of October, 1887, and the entry of which merchandise was made on or about the 4th day of November, 1887, the invoice of said merchandise being dated Paris, September 17th, 1887.

We, the undersigned, claiming that said merchandise is liable to duty only at the rate of five (5) cents per square yard and 35 per cent. ad valorem under the provisions of the first clause of paragraph 365, Schedule K of the tariff act of March 3d, 1883, which provides for women's and children's dress goods, coat lining, Italian cloths, and goods of like description, composed in part of wool, worsted, the hair of the Alpaca goat or other animal, valued at not exceeding twenty cents per square yard; our said merchandise being women's dress goods in value not exceeding twenty cents per square yard and being composed in part of wool and in part of cotton.

Yours, &c.,

LUCHEMEYER, SCHEFER & CO.,
By A. P. KETCHUM, *Atty.*,
4 *William Street, New York City.*

13 *"Schedule C," mentioned in foregoing complaint.*

Port of New York. In the matter of the entry and exaction of duty on a certain lot of merchandise imported per S. S. La Bretagne on the 3d day of October, 1887, by Luckemeyer, Schefer & Co., importers. Appeal No.—

To the Secretary of the Treasury:

You will take notice: That pursuant to the provisions of existing laws, we hereby appeal from the decision of the collector of customs at this port, assessing duty on our importations of merchandise described in the annexed protest, and for the reasons particularly set forth therein.

Dated December 21st, 1887.

A. P. KETCHUM,
Attorney for Luckemeyer, Schefer & Co.,
Office and post office address, 4 William st., New York City.

14 (Endorsed): 12292. N. Y. Supreme Court, city and county of New York. Edward Luckemeyer, Carl Schefer, and others, against Daniel Magone. Complaint and bill of particulars. Bangs, Stetson, Tracy & MacVeagh, attorneys for plaintiffs, 45 William street, New York City, New York. Due service of a copy of the within is hereby admitted. Dated this day of , 18 . A copy of the within paper has been this day received at this office, Apr. 17, 1888. Stephen A. Walker, U. S. Attorney. U. S. circuit court. Filed Sep. 19, 1888. John A. Shields, clerk.

15 United States circuit court, southern district of New York.

EDWARD LUCKEMEYER, CARL SCHEFER, AND William Schramm, plaintiffs,
vs.
DANIEL MAGONE, DEFENDANT.
} N. S. 12292.

The defendant above named, answering the complaint herein, respectfully shows to this court:

That he has not sufficient knowledge to form a belief as to the existence of the copartnership alleged in the first paragraph of said complaint, and therefore denies the same.

That he admits the importation of certain cases of dress goods, as set forth in said complaint, and also that he was at the times therein mentioned and now is collector of customs at the port of New York.

And further answering, defendant denies that the true and lawful rate of duty on the goods referred to in the complaint was as claimed in the said complaint; and he denies that the plaintiffs were compelled to pay or did pay to him as collector, or otherwise, the sum stated in the complaint, or any sum in excess of the amount required by law as duty upon the said goods, or that any sum of money not authorized by law was exacted as duties on said goods or otherwise.

16 Further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the bill of complaint alleged to have been made were sums due from plaintiffs to the United

States as duties, according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and that no other sums than duties regularly assessed and ascertained and liquidated, according to law, upon the plaintiffs' entry thereof, were collected or received by defendant from the plaintiffs.

Wherefore, defendant demands that the complaint be dismissed, and that he have judgment against the plaintiffs for his costs.

STEPHEN A. WALKER,
U. S. Attorney, and Attorney for Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Daniel Magone, being duly sworn, deposes and says that he is the defendant above named; that he has read the foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters and things therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

D. MAGONE.

E. B.

Sworn to before me this 27th day of Sept., 1888.

EDW. HILLIER,
Notary Public City and County of New York.

17 (Endorsed:) 12292. U. S. circuit court, southern district of New York. Edward Luckemeyer, Carl Schefer, and Wm. Schramm versus Daniel Magone. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. U. S. circuit court. Filed Sep. 27, 1888. John A. Shields, clerk.

18 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Tuesday, the 7th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Present, the honorable E. Henry Lacombe, circuit judge.

EDWARD LUCKEMEYER ET AL.
vs.
DANIEL MAGONE. } No. 12292.

Now come the plaintiffs, by Francis L. Stetson, their attorney, and move the trial of this cause.

Likewise comes the defendant, by Stephen A. Walker, United States attorney, and Henry C. Platt, assistant United States attorney, his attorneys.

Thereupon a jury is impanelled, and the cause proceeds to trial.

Afterwards, to wit, on the 12th day of February, instant, after hearing the evidence of the respective parties, the argument of counsel, and the instructions of the court, the jury retire under charge of officers duly qual-

ified to attend them, and upon their return, on the 13th day of February, instant, say that they find a verdict for the plaintiffs in the sum of two hundred and thirty-eight dollars and forty-eight cents ($238.48).

19 On motion of Henry C. Platt, assistant United States attorney, it is

Ordered, That the defendant have a certificate of probable cause and a stay of all proceedings upon said verdict for sixty (60) days, within which to make and serve a bill of exceptions.

An extract from the minutes.

JOHN A. SHIELDS,
Clerk.

20 Circuit court of the United States, southern district of New York.

EDWARD LUCKEMEYER, CARL SCHEFER, AND WILLIAM SCHRAMM *against* DANIEL MAGONE. } 12292.

The issues in this action having been tried before Hon. E. Henry Lacombe, circuit judge of the United States, and a jury at a stated term of the said court for the southern district of New York in the second circuit, held at the United States court rooms in the city of New York on February 7th, 1889, and upon subsequent days; and the jury, after hearing the evidence of the respective parties, having on February 13th, 1889, found a verdict for the plaintiffs for two hundred and thirty-eight dollars and forty-eight cents, and the plaintiffs' costs having been duly taxed at the sum hereinafter stated.

On motion of Bangs, Stetson, Tracy & MacVeagh, attorneys for the plaintiffs, it is

Adjudged that the plaintiffs recover from the defendant the sum of two hundred and thirty-eight and $\frac{48}{100}$ dollars, the amount of the jury's verdict, together with the sum of fifty-two $\frac{86}{100}$ dollars, costs as taxed, mak-

21 ing in the aggregate the sum of two hundred and ninety-one $\frac{33}{100}$ dollars.

Judgment signed this 30th day of March, A. D. 1889.

JOHN A. SHIELDS,
Clerk.

The entry of judgment herein, this 30th day of March, 1889, is hereby consented to, notwithstanding the stay heretofore granted herein; it is deemed that said stay expired with the filing of the bill of exceptions in the office of the clerk of the court.

Dated March 30, '89.

STEPHEN A. WALKER,
U. S. Att'y for Deft.

(Endorsed:) 12292. U. S. circuit court, southern district of N. Y. Edward Luckemeyer, Carl Schefer, and William Schramm against Daniel Magone. Judgment. Bangs, Stetson, Tracy & McVeagh, attorneys for plaintiffs, 45 William street, New York City, New York. U. S. circuit court. Filed Mar. 30, 1889. John A. Shields, clerk.

22 United States circuit court, southern district of New York.

EDWARD LUCKEMEYER ET AL.
against
DANIEL MAGONE, COLLECTOR. } N. S. 12292.

Defendant's bill of exceptions.

And afterwards, to wit, on the 7th, 8th, 11th, 12th, and 13th days of February, 1889, this case came on to be tried before the Hon. E. Henry Lacombe, U. S. circuit court, and a jury, duly impanelled and sworn to try the issues herein.

The plaintiffs were represented by their counsel, Francis Lynde Stetson; and the defendant by his counsel, Stephen A. Walker, U. S. attorney, and Henry C. Platt, assistant U. S. attorney.

The plaintiffs introduced testimony showing the importation by them at the port of New York on the 14th day of November, 1887, of certain women's dress goods, consisting of cashmeres composed chiefly of wool, with a very slight percentage of cotton, and valued at not exceeding twenty cents per square yard.

Upon this importation, the defendant, as collector of customs at the port of New York, levied and collected duty at nine cents per square
23 yard and forty per centum ad valorem, under the following provision of Schedule K of the tariff act of March 3, 1883, to wit:

"Women's and children's dress goods, coat linings, Italian cloths, and goods of like description, composed in part of wool, worsted, the hair of the alpaca goat, or other animals, valued at not exceeding twenty cents per square yard, five (5) cents per square yard, and in addition thereto, thirty-five (35) per centum ad valorem; valued at above 20 cents per square yard, seven (7) cents per square yard, and forty (40) per centum ad valorem; if composed wholly of wool, worsted, the hair of the alpaca goat, or other animals, or of a mixture of them, nine cents per square yard and forty per centum ad valorem, but all such goods with selvedges made wholly or in part of other materials, or with threads of other materials introduced for the purpose of changing the classification, shall be dutiable at nine cents per square yard and forty per centum ad valorem: Provided that all such goods weighing over four ounces per square yard shall pay a duty of thirty-five (35) cents per pound and forty (40) per centum ad valorem."

The plaintiffs in due season protested and appealed to the Secretary of the Treasury, who affirmed the decision of the collector.

The plaintiffs' protest is as follows:

24 "NEW YORK, *December 21st*, 1887.

To the Collector of Customs, Port of New York:

SIR: We hereby protest against the payment of duty at the rate of nine (9) cents per square yard and 40 per cent. ad valorem (which is the duty provided for all wool dress goods) on our certain lots of merchandise, being cotton and woolen dress goods imported by us into this port for warehouse per S. S. La Bretagne, which arrived at this port on the 3rd day of Octo-

ber, 1887, and the entry of which merchandise was made on or about the 4th day of November, 1887, the invoice of said merchandise being dated Paris, September 17th, 1887.

We, the undersigned, claiming that said merchandise is liable to duty only at the rate of five (5) cents per square yard and 35 per. cent ad valorem under the provisions of the first clause of paragraph 365, Schedule K, of the tariff act of March 3d, 1883, which provides for women's and children's dress goods, coat linings, Italian cloths and goods of like description, composed in part of wool, worsted, the hair of the alpaca goat or other animal, valued at not exceeding twenty cents per square yard; our said merchandise being women's dress goods in value not exceeding twenty cents per square yard and being composed in part of wool and in part of cotton.

Yours, &c.,

LUCKEMEYER, SCHEFER & CO.,
By A. P. KETCHUM,
Atty., 4 William St., New York City.

25 This suit was brought to recover the alleged excess of duties between the two rates of nine cents per square yard and forty per centum ad valorem, and five cents per square yard and thirty-five per centum ad valorem.

Testimony was given upon the part of the plaintiffs to show that the merchandise in suit was manufactured in France at the request of the plaintiffs by a peculiar process, by which the cotton was introduced into the warp of the fabric prior to the spinning process; that the filling was entirely of wool; that the warp consisted of woolen and cotton fibers twisted together; but that no separate, single, distinct, continuous thread of cotton existed therein; that the selvedges of these goods were formed from the warp threads of the goods, drawn together in a dent, and that they were composed of wool and cotton in the same combination and extent as the warp of the goods; that in appearance, texture, quality, and use, they were indistinguishable from women's dress goods composed wholly of wool, and the cotton in the fabric could be discovered only by chemical analysis; that the original purpose of introducing such cotton into the warp of the goods was for the purpose of changing the classification.

Testimony was also given on the part of the plaintiffs by manufacturers and dealers of large experience to show that the introduction of the cotton in the warp of the goods tended to strengthen the fabric and give it
26 a brighter lustre than that of all-wool dress goods; that the percentage of cotton in these goods varied from 1.99 to 4.47.

Testimony on the part of the defendant of manufacturers, dealers, and chemists of large experience was given, tending to show that woman's dress goods manufactured in the peculiar manner of the plaintiffs' goods in suit were unknown in the trade and commerce of this country at the time of the passage of the tariff act of 1883. That they first appeared in the market of this country about two years ago, and were bought as all wool fabrics. That the introduction of so small a percentage of cotton in the warp of these goods did not strengthen the fabric, but rendered it less desirable to the purchaser and less durable in its wear. That the fibres of cotton in the warp of these goods were continuous, but irregular in size,

and that the twisted fibres of cotton and wool constituted the warp or thread. That the cotton had been apparently introduced for the purpose of changing the classification. That it cost more to manufacture these goods with such a small percentage of cotton in them than it did to manufacture the same class of goods from all wool or worsted. That it requires special machinery to manufacture the goods in this particular manner. That all wool or worsted dress goods require to be dyed once, whereas goods made in this manner have to be dyed twice, and the process of dyeing was more expensive than in all wool fabrics of the same nature.

27 That there was more waste, and the waste was worth less in the manufacture of these goods than in the manufacture of all wool goods of the same class.

William Whitman, a witness on the part of the defendant, of long experience as a manufacturer and merchant, dealing in this class of goods, was asked by defendant's counsel:

"Q. Are the plaintiff's goods, of which samples are before you, composed substantially of wool?"

This was objected to by plaintiff's counsel as immaterial and the objection was sustained by the court, to which defendant's counsel then and there excepted.

Also the following question:

"Q. Are those goods, or goods of which those are samples, bought and sold in this country as all wool goods?"

Objected to by plaintiff's counsel as irrelevant and objection sustained by the court, to which defendant's counsel then and there excepted.

Nathan T. Folwell, a merchant and manufacturer, a witness for the defendant, having testified that he first discovered and knew of these goods being in the market in this country about 1887, was asked this question:

"Q. When you first discovered them, how were they bought and sold?"

28 This question was objected to by plaintiffs' counsel as immaterial, which objection was sustained by the court, and to which defendant's counsel then and there excepted.

At the close of the evidence counsel for the defendant moved for a direction of a verdict for defendant, on the ground that the plaintiffs had not proven facts sufficient to entitle them to recover, which motion was denied by the court, to which defendant's counsel then and there excepted.

Also upon the ground that it appeared from the uncontradicted evidence in the case that the selvedges of the goods were made wholly or in part of other materials than wool, introduced for the purpose of changing the classification, which was denied by the court, and to which counsel for defendant then and there excepted.

Also upon the ground that it appeared from the evidence that threads of other materials were introduced in such goods for the purpose of changing the classification, the warp of the goods being a compound thread concededly composed of wool and cotton; which motion was denied by the court, and to which counsel for the defendant then and there excepted.

Also upon the ground that the evidence showed that the goods were substantially composed of wool, the cotton being an insignificant part thereof, and not sufficient to take the goods out of the class of dress goods

composed wholly of wool, dutiable under Schedule K, at nine cents
29 per square yard and forty per centum ad valorem; which motion was denied by the court, and counsel for defendant then and there excepted.

After the denial of these motions, the court stated:

"I shall instruct the jury that a mixed material thread, of which the principal part is wool, is not a thread of other material within the meaning of that clause" (Schedule K); to which counsel for defendants then and there excepted.

The court submitted to the jury the question whether threads of other materials had been introduced for the purpose of changing the classification.

The court thereupon charged the jury, among other things, as follows:

"How then do they (Congress) provide for the goods which, although in reality of one class, may be claimed, in order to evade the operation of a tariff act, to be another? 'But all such goods, with selvedges, made wholly or in part of other materials.'

"The use of the word 'such,' and of the word 'other,' turns us back to preceding words in order to find out what that particular clause means. Turning to those words, we find the whole sentence to read thus:

"'If composed wholly of wool, * * * or of a mixture of them, nine cents per square yard and forty per centum ad valorem, but all such goods with selvedges, made wholly or in part of other materials.'"

30 "The only possible construction of that clause, standing by itself, it seems to me, is this: That goods composed wholly of wool, worsted, or a mixture of them, shall pay nine cents per square yard and forty per centum ad valorem, but that all goods composed wholly of wool, worsted, or of a mixture of them, which have selvages, made wholly or in part of other materials, shall pay the different rate which is provided further on."

To this, counsel for defendant then and there excepted. The court also charged the jury, among other things, as follows:

"Has there been introduced into these goods threads of material other than wool or worsted; that is, threads, or threads of other material, not composition or compound thread, composed of wool and other materials, but a thread, standing by itself, of material other than wool?"

To this, counsel for defendant then and there excepted.

The court also charged the jury, among other things, as follows:

"The plaintiffs are not prohibited from so manufacturing goods as to conform to a lower rather than a higher exaction of the tariff; and though they may have adopted a very technical device to escape the higher rate, the question presented by the case is, only whether their goods are embraced within the higher rate, and is not whether the plaintiffs have evaded the law."

31 To this, counsel for defendant then and there expected.

Counsel for defendant then and there requested the court to charge that "if the jury find that the selvedges of these goods was made wholly or in part of cotton, introduced for the purpose of changing the classification, there should be a verdict for the defendant," which request the court thereupon refused to charge, to which refusal counsel for defendant then and there excepted.

Counsel for defendant then requested the court to charge that "if the jury find that the plaintiff's goods were made with threads composed of wool and cotton, introduced for the purpose of changing the classification, their verdict should be for the defendant," which request the court thereupon refused, to which refusal the defendant, by his counsel, then and there excepted.

Counsel for defendant then requested the court to charge that "if the jury find that these goods are women's dress goods, substantially composed of wool, and known in trade and commerce as all-wool fabrics, the defendant is entitled to a verdict," which request the court thereupon refused, and to which refusal the defendant, by his counsel, then and there excepted.

Counsel for defendant then requested the court to charge that "if the jury find that the quantity of cotton introduced in these goods is so insignificant as not to alter the character of the goods and remove them
32 from the category of all-wool dress goods, as known in trade and commerce, the defendant is entitled to a verdict," which request the court thereupon refused, and to which refusal the defendant, by his counsel, then and there excepted.

And afterwards the jury retired to consider of their verdict, and returning, rendered a verdict for the plaintiff, for $238.48.

And for as much as the exceptions, matters and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions, on the prayer of the said defendant, by his counsel; and

It is ordered: That the same be filed as a part of the record herein, with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand, at New York City, this 29th day of March, 1889.

E. HENRY LACOMBE.

(Endorsed): N. S. 12,292. U. S. circuit court, southern district of New York.—Edward Luckenmeyer et al. versus Daniel Magone, collector.—Defendant's bill of exceptions.—Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, 188
33 Attorney for plaintiff. To , attorney for plaintiff. U. S. circuit court. Filed March 29, 1889. John A. Shields, clerk.

34 Supreme Court of the United States.

DANIEL MAGONE, PLAINTIFF IN ERROR,
vs.
EDWARD LUCKEMEYER, CARL SCHEFER, and WILLIAM SCHRAMM, defendants in error.
} Assignment of errors.

Afterwards, to wit, on the second Monday of October in the same term before the justices of the said court at the Capitol in Washington, come the said plaintiff in error by Stephen A. Walker, his attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against

the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff pray' that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
U. S. Attorney, Atty. for Plaintiff in Error.

35 (Indorsed:) 12292. United States Supreme Court. Daniel Magone, plaintiff in error, vs. Edward Luckemeyer, defendant in error. Assignment of error. Stephen A. Walker, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 5 day of April, 1889. A copy of the within paper has been this day received at this office Apl. 5, 1889. Bangs, Stetson, Tracy & MacVeagh, attorneys for ——— ——, in error. U. S. circuit court. Filed April 5, 1889. John A. Shields, clerk.

36 UNITED STATES OF AMERICA, *ss:*

To Edward Luckemeyer, Carl Schefer, and William Schramm, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Daniel Magone is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Dated April 4th, 1889.

E. HENRY LACOMBE.

37 (Indorsed:) E. & A. A., 814. 12292. U. S. Supreme Court. Daniel Magone, plaintiff in error, against Edward Luckemeyer et al., defendants in error. Citation. Stephen A. Walker, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 5th day of April, 1889. A copy of the within paper has been this day received at this office. Bangs, Stetson, Tracy & Mac Veagh, No. 45 William street, New York, attorneys for defendants in error. U. S. circuit court. Filed Apr. 5, 1889. John A. Shields, clerk.

(Indorsed on cover:) S. New York, C. C. U. S. No. 880. Daniel Magone, collector of the port of New York, plaintiff in error, vs. Edward Luckemeyer, Carl Schefer, and William Schramm. Filed October 1st, 1889

Office Supreme Court U.S.
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MAR 30 1891
JAMES H. MCKENNEY
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

DANIEL MAGONE, COLLECTOR of the port of New York, etc., plaintiff in error,
vs.
EDWARD LUCKEMEYER ET AL.
No. 880.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff pray that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action in the circuit court was by Luckemeyer, Schaefer & Schram, importers, to recover from Daniel Magone, collector of customs, $749.02, alleged to have been illegally exacted by the defendant as duties upon an importation of dress goods on the 4th day of November, 1887. The liquidation by the collector under which the

money was exacted was duly protested against, and the decision of the collector appealed from within the proper time to the Secretary of the Treasury. The trial resulted in a verdict for the plaintiffs in the sum of $238.48, upon which judgment was entered. The bill of exceptions, to be found on pages 9 *et seq.* of the record, shows the case made by the plaintiff to have been as follows:

The importation was of certain women's dress goods, consisting of cashmeres composed chiefly of wool with a very slight percentage of cotton, and valued at not exceeding 20 cents per square yard; that they were manufactured in France at the request of the plaintiffs by a peculiar process, in which the cotton was introduced into the yarns making up the warp of the fabric prior to their being sponged; that the collector classified these goods under paragraph "E" of clause 365, Tariff Indexed, New, while the importers protested on the ground that they should have been classified under paragraph "B" of the same clause.

Clause 365, Tariff Indexed, of 1883 is as follows:

> (*a*) Women's and children's dress goods, coat linings, Italian cloths, and goods of like description, composed in part of wool, worsted, the hair of the alpaca, goat or other animals
>
> (*b*) Valued at not exceeding twenty cents per square yard, five cents per square yard, and in addition thereto, thirty-five per centum ad valorem;
>
> (*c*) Valued at above twenty cents per square yard, seven cents per square yard, and forty per centum ad valorem.
>
> (*d*) If composed wholly of wool, worsted, the hair of the alpaca, goat, or other animals, or of a mixture

of them, nine cents per square yard and forty per centum ad valorem.

(*e*) But all such goods with selvedges, made wholly or in part of other materials, or with threads of other materials introduced for the purpose of changing the classification, shall be dutiable at nine cents per square yard, and forty per centum ad valorem.

(*f*) *Provided*, That all such goods weighing over four ounces per square yard shall pay a duty of thirty-five cents per pound and forty per centum ad valorem.

The bill of exceptions further shows that the weft or filling was made up of yarns entirely of wool; that the selvedges of the goods were made of the same material and in the same way as the warp of the goods; that the percentage of cotton in the completed goods varied from 1.99 to 4.47 per cent.; that in appearance, texture, quality, and use they were indistinguishable from women's dress goods composed wholly of wool, and that the cotton in the goods could be discovered only by chemical analysis; and that the original purpose of introducing the cotton into the warp of the goods was to change the classification.

There was some conflict of evidence as to whether the introduction of the cotton improved the goods and their usefulness. The defendant's evidence tended to show that such goods had been unknown in the trade and commerce of the country at the time of the passage of the tariff act of 1883; that they first appeared in the market of this country in 1885 and were bought as all-wool fabrics. Defendant's counsel asked defendant's witnesses whether these goods were bought and sold in this country as all-wool goods. Objection was made to the question, which

wool, and if introduced for the purpose of changing the classification bring the cloth so made within clause E of paragraph 365, quoted above.

2. Cloth composed wholly of wool, with the exception of a small amount of cotton, so inappreciable in quantity as not to affect either the value or commercial designation or real character of the goods as all-wool goods, is within clause D of paragraph 365.

I.

In the construction of statutes the controlling fact is the intention of Congress. That intention is to be gathered from the surrounding circumstances, taken in connection with the language used. An abiding conviction on the part of the court that Congress intended to accomplish a result which the language does not permit, of course does not justify the court in violating the ordinary meaning of words in order to carry out the legislative purpose. But when Congress has used language which is capable of being construed in one way or another, and the intention of Congress is so apparent that he who runs may read, then that construction is to be given which will give effect to the intention.

The intention of Congress in clause *E* is too plain to be escaped. "All such goods" refers, of course, to goods which have been described in clause *D*, which are goods "composed wholly of wool," etc. Clause *E* covers two classes of goods; first, all wool goods with selvedges of other materials; and, second, all wool goods, with threads of other materials introduced for the purpose of changing

the classification. Selvedges are often composed of a different material from the body of the cloth, and that without the ulterior motive of changing the proper classifications. Congress intended to tax the body of the cloth, and the duty was made to depend on its texture, and not upon that of its selvedge. It was made immaterial, therefore, what the object of the manufacturer in weaving the selvedge of different material was.

The second class of goods sought to be covered by clause *E*, was goods which for every purpose, except that of paying duty, were intended to be and were all-wool goods. If the introduction of threads into the otherwise all-wool cloth in fact changed the character of the cloth, then it would not be included in the second class defined by clause *E*. The intention of Congress, therefore, was that no one should be permitted to evade the classification of all-wool goods by the introduction of an inappreciable amount of other material into the texture of the cloth, which should not in fact change its character as an all-wool fabric.

To effect this intention it described the cloth as all-wool goods into which threads of other materials had been introduced to change the classification. And now the claim is that if the attempt to evade the law is made with threads partly composed of wool and some other materials, which, in fact, make a less change in the cloth from all-wool goods than if the threads were wholly of other material, the attempt must be successful. No one will have the boldness to claim that Congress intended that an evasion should be successful if the threads used for the purpose were partly of wool. The wit of man will fail to find a

reason for such a distinction. But it is said Congress was not acute enough to cover every case in which the proper classification could be successfully evaded. Why? Because, so it is said, other materials must mean "wholly of other materials."

Is this a necessary construction? Emphatically, no. It is not doing violence to the word "other" to say that a thread partly of wool and partly of cotton is a thread of "other material" than that of cloth made wholly of wool. The thread represents the lowest unit ordinarily referred to in the texture of cloth, because the mass of material in a thread is indistinguishable. This mass, if composed partly of wool and partly of cotton, is a different material than if it were made wholly of wool. It is a mixture, different from either ingredient. At least, "other material" may mean what we claim for it. If so, then the courts are bound to give effect to the Congressional intent and so construe it.

The contention by the importers and the construction put upon the statute by the court below make the Government say to the importer "If you try to cheat me by a whole thread, you will be defeated; but, if you do it with a half thread, then you may be successful. If you cheat me by the use of something which is less likely to cheapen your goods and is likely to take them less out of the all-wool clause than if you use threads wholly of other material, you will in the eye of the law succeed in getting a lower classification and will be allowed to pay a less duty. Thus is your keener fraud rewarded."

With great deference to the learned judge below, he certainly seems to have been hunting for a reason why the

intention of Congress should not be carried out in the enactment of laws. We freely admit that if Congress would tax something it must describe it so that it should be taxed; but when Congress has signified its intention in words too plain to be misunderstood, and that intention can be given effect by an ordinary construction of the words used, we know of no rule of law that requires the court to give a construction never intended by Congress because the language used will permit it.

We admit that where there is a doubt as to the construction of a statute imposing a tax the doubt is to be resolved in favor of the importer. Such a doubt, however, is a doubt arising after the intention of Congress has been considered in connection with the language used. If the congressional intention is clear and the language will permit courts to give it effect, then there is no doubt. The court below has treated the importers with the tenderness with which the judges under the old common law treated persons charged with capital offenses, and have reached a conclusion which no one, in the ordinary affairs of life and using the common sense which ought to belong to courts as well as to men, would reach.

We respectfully maintain that the Government has some rights in the construction of revenue statutes, and that the intention of the law-making power is not to be avoided by the narrowest construction that can be placed on language.

Reference will be made to the fact that in the same clause, *E*, of paragraph 365, the selvedges, which are not to affect the classification, may be made "wholly or in part of other materials." From which it will be argued

that this, by implication, limits the meaning of "threads of other materials" to threads wholly of other materials. This is a mere implication, permissible only in cases of doubtful construction. No one ever heard of an implication being entertained in construing a statute against the intention of the legislature. As Chief-Justice Marshall said in *Durrouseau* vs. *United States* (6 Cranch, 317):

> It would be repugnant to every principle of sound construction to imply an exception against the intent.

The expression "wholly or partly of other material" was used with respect to selvedges, because the unit in the mind of Congress was the thread, and it was intended to save the case of where the selvedges were made up of different threads, some of wool and some of other materials. When the introduction of threads was spoken of, however, the material of their composition was treated of as in mass and indistinguishable, and a mixture, like a chemical compound, was a material *other* than either ingredient.

II.

These goods were all-wool goods. The presence of cotton in them could not be detected except by chemical analysis. They sold as all-wool goods. Their use betrayed no difference. Commercially and actually, for every purpose for which they were manufactured, they were all-wool goods. Is it the duty of courts to use the microscope and the retort to find a reason why a palpable attempt at an evasion of the law and the legislative intent should be encouraged and rewarded? Could there be a stronger case for the application of the maxim "*De minimis*

non curat lex." Evidence that such goods were known in the trade as all-wool goods was rejected, and this ruling is assigned for error.

No evidence was needed to establish a fact which must follow from the circumstance that no one in the trade but a chemist could tell that these goods were not all wool. The commercial designation of an article among traders and importers, when clearly established, fixes its character for the purpose of the tariff laws.

Arthur vs. *Lahey* (96 U. S. R., 112).
Arthur vs. *Morrison* (96 U. S. R., 108).
Greenleaf vs. *Goodrich* (101 U. S. R., 278).

On either the first or the second ground it is respectfully submitted that the judgment of the court below should be reversed, and that the court should be ordered to enter a judgment for the United States.

WM. H. TAFT,
Solicitor-General.

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MAR 30 1891
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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 880—March 30, 1891.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK, ETC.,
Plaintiff in Error,

vs.

EDWARD LUCKEMEYER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

FRANCIS LYNDE STETSON,
Of Counsel.

Evening Post Job Printing House, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 880.

DANIEL MAGONE, Collector of the Port of New York,
Plaintiff in Error,

AGAINST

EDWARD LUCKEMEYER, CARL SCHEFER and WILLIAM SCHRAMM,
Defendants in Error.

March 30, 1891.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

1. The defendants in error, being plaintiffs below, recovered a judgment (fo. 21) for $238.48 upon the verdict of a jury (fo. 18–19) that such amount had been illegally exacted from them by the Collector of the Port of New York, now the plaintiff in error.

2. The case arose upon an importation (fo. 22) "of certain *women's dress goods* consisting of cash-"meres composed chiefly of wool with a very small "percentage of cotton and valued at not exceeding "twenty cents per square yard," embraced under Schedule K, Section 365 of the Tariff of 1883.

The importers asserted that the goods, being composed *in part of cotton*, and not being composed *wholly of wool*, were dutiable at 5 cents per square yard and 35% *ad valorem* (fo. 24).

The Collector treating the goods as substantially "*all wool*" goods, held (fo. 23) that they were dutiable at the rate of 9 cents per square yard and 40% *ad valorem*. He collected duty accordingly (fo. 23), notwithstanding the timely protest of the defendants in error (fo. 24). They properly appealed to the Secretary of the Treasury, and in absence of relief from him brought this suit to recover back the duties illegally exacted.

3. The facts as to the character of the goods are distinctly summarized in the case as follows (fo. 25):

They were manufactured in France at the request of the plaintiffs by a peculiar process, by which the cotton was introduced into the *warp* of the fabric, *prior to the spinning process;* the *warp* being thus composed of woolen *and cotton* fibres twisted together, *but without any separate, single, distinct, continuous thread of cotton;* the *selvedges* were formed by these warp threads being drawn together in a dent, and were composed of wool and cotton in the same combination and extent as the warp; the *filling* or *woof* was entirely of wool; and the percentage of cotton in the goods varisd from 1.99 to 4.47.

The question whether *threads* of materials other than wool had been introduced into these goods for the purpose of changing the classification was distinctly submitted to the jury (fo. 29), which found thereon in favor of the defendants in error (fo. 32).

It was not disputed by the defendants in error that the *original* purpose of introducing such cotton (*not being cotton threads*) into the warp of the goods was for the purpose of changing the classification

(fo. 25), although such manufacture also tended to strengthen and beautify the goods (fo. 26). It was conceded that in appearance, texture, quality and use, the fabrics were indistinguishable from women's dress goods composed wholly of wool, the cotton being discoverable only by chemical analysis. This process of manufacture was undoubtedly more expensive than the ordinary process and would not have been adopted except in view of the difference in classification under the tariff of 1883 (fo. 26, 27).

4. The Court, declining the motions of both parties to direct a verdict, left it to the jury (fo. 29) to determine whether these goods contained a thread of cotton introduced for the purpose of changing the classification made wholly or in part of materials other than wool. This question being decided by the jury in favor of the defendants in error, the general verdict was, under the instructions of the Court, also in their favor.

5. To the instructions, refusals and rulings of the Court the counsel for the plaintiff in error took fifteen exceptions, which may be classified as follows:

(*a.*) *One exception* (fo. 30) was to the Court's construction of the law.

(*b.*) *Six exceptions* (fo. 27, 27, 27, 29, 31, 32) involved the question whether these were "*all-wool*" goods, or "*substantially all wool,*" or goods known to trade and commerce as "*all-wool goods.*"

(*c.*) *Two exceptions* (fo. 28, 31) inquired whether the selvedges of these goods being merely the compound warp threads dented together (fo. 25), were selvedges in whole or in part of material other than wool.

(*d.*) *Four exceptions* (fo. 28, 29, 30, 31) presented

the question whether the warp threads compounded of wool and cotton were *threads* of material other than wool.

(*e.*) *One exception* (fo. 30) was to the charge of the Court that the question was not whether the importers had evaded the tariff law.

(*f.*) *One exception* (fo. 28) is so general in terms as not to require special consideration.

The learned Solicitor-General properly reduces all these exceptions to two propositions of law, viz:

(1.) That the cotton in these goods, though not in the form of a thread, aided in forming a compound thread of material other than "all-wool."

(2.) That the goods were in effect "all-wool" goods.

These two propositions we withstand upon the grounds disclosed under our Third Point and Second Point respectively.

To aid in discussion of the whole case the defendants in error submit three other points as well.

First Point.

The Court below committed no error in construing this particular clause of the tariff of 1883.

FIRST.—For convenient reference this dry goods clause (omitting matter not now important) is here printed in the form that best conveys the importers' understanding of its meaning:

General class. "SCHEDULE K: WOOL AND WOOLENS.

Special class. "365. *Women's and Children's Dress Goods, etc.*,

Subdivision I. (A.) "Composed IN PART of wool, worsted, etc.,
(B.) " valued at not exceeding 20 cents per square yard,
" 5 cents per square yard, and in addition thereto 35% *ad valorem*,
(C.) " etc.

Subdivision II. (D.) "If composed WHOLLY of wool, worsted, etc., or of a mixture of them,
" 9 cents per square yard and 40% *ad valorem*,

Exceptions. (E.) " but all *such* goods,
(*a*) " with *selvedges* made wholly or in part of other material, or
(*b*) " with *threads* of other materials
" introduced for the purpose of changing the classification
" shall be dutiable at 9 cents per square yard and 40% *ad valorem*;

Proviso. (F.) " *Provided* that all *such* goods weighing over four ounces per
" square yard shall pay a duty of 35 cents per pound
" and 40% *ad valorem*."

SECOND.—The construction of the Court below was as follows (38 Fed. Rep., 32):

" Of course it is a matter of common knowledge that the Tariff Acts are
" devised for more than the single purpose of raising revenue.

" The creating, protection and fostering of home industries, large or
" small or yet unborn, is an important element which is considered by the
" law makers when they frame these statutes, and that some such object
" was intended here seems to me plainly apparent upon a comparison of
" the two paragraphs No. 365 and the clause in the Revised Statutes.

" By the act of June 22, 1874, all women's and children's dress goods,
" whether made of mixed material or made wholly of wool, were dutiable
" at 6 cents per square yard and 35% *ad valorem*.

" The act of March 3, 1883, divides them into two groups, the mixed
" goods, and the wholly wool goods.

" On the *mixed goods* they reduce the duty from 6 cents per square yard " and 35% *ad valorem* to 5 cents per square yard and 35% *ad valorem*.

" But on the *wholly wool goods* they raise the duty very materially. " They raised it from 6 cents per square yard, and 35% *ad valorem* to 9 " cents per square yard and 40% *ad valorem*.

" The mere comparison of these two paragraphs seems plainly to in- " dicate that there was an intention in fixing this new rate of duty, to ac- " cord some measure of protection to the *wholly wool goods*.

" Taking that into consideration, the plain, first meaning which any one " would draw from the closing part of the paragraph, which begins with " the words: '*If composed wholly of wool, worsted, &c.*' is that Congress " intended to provide that if goods of the *wholly woolen* class were so dis- " guised that they might be masqueraded as *mixed goods*, when in reality " they were *wholly of wool*, they should not by that operation avoid the " heavy discrimination which was laid against the *wholly wool goods*.

" Although we may be quite well satisfied that that was the intent of " Congress, I do not think, with all the lights we have, and considering " the great lengths to which the Courts have repeatedly gone in applying " the doctrine of interpretation according to the intent, that we are war- " ranted in interpreting this last clause of the paragraph, unless we can " find within the plain language used, when fairly interpreted, such words " as will warrant the application of that construction.

" *How then do they provide for the goods which, although in reality of one " class, may be claimed, in order to evade the operation of the Tariff Act, " to be another.*

" 'But all such goods with selvedges made wholly or in part of other " 'materials.'

" *The use of the word* 'such,' *and of the word* 'other' *turns us back to " preceding words in order to find out what that particular clause means. " Turning to those words we find the whole sentence to read thus:*

" 'If composed wholly of wool * * * or of a mixture of them, " '9 cents per square yard and 40% *ad valorem*, but all SUCH goods with " 'selvedges made wholly or in part of other material, &c.'"

" *The only possible construction of that clause standing by itself, it seems " to me, is this: That goods composed* WHOLLY, *of wool, worsted, or a mixture " of them, shall pay 9 cents per square yard and 40% ad valorem, but that " all goods composed* WHOLLY *of wool, worsted, or of a mixture of them, " which have* SELVEDGES *made wholly or in part of other materials shall pay " the different rate which is provided further on.*"

" That disposes of that clause with one exception.

" The other clause used by Congress is the one which I shall leave to " the jury, and my remarks upon the construction of this statute are for " the benefit more particularly of counsel."

(*The part printed in italics is that* excepted to by the counsel for plaintiff in error, fo. 30.)

In passing, it may be observed that the Court

here meant not that wholly woolen goods with selvedges of other materials paid a rate of duty different *in amount* from that imposed on wholly woolen goods, but only that the rate of duty for wholly woolen goods with such selvedges was differently and specifically provided further on and after the rate for wholly woolen goods.

The Court laid the emphasis on the word "*such*," attaching the condition of selvedges only to goods "*composed wholly of wool*," and not to the prior subdivision concerning only goods "*composed in part of wool.*"

In thus reading the exception as if written "*but all goods composed wholly of wool with selvedges of other material, &c.*," by limiting the relative "*such*" to its proper and necessary antecedent the Court was clearly right and in accord with the decision in *Allison* vs. *Hartranft* (24 *Fed. Rep.*, 136), which makes the subsequent and still more distant "*such*" in the *proviso* refer to the same antecedent, to which Judge LACOMBE referred this intermediate "*such.*"

This, too, is the contention of the learned Solicitor-General, who says: "'*All such goods*' refers, of "course, to goods which have been described in "clause *D*, which are goods '*composed wholly of* "*wool.*'"

THIRD.—Thus properly construed, the question as to the composition of the selvedge, which here consisted merely of the warp threads dented together (which is not a *true selvedge, but merely the goods themselves so woven as to avoid ravelling*), was of no consequence, for the goods were only in part and not wholly composed of wool, as is more particularly argued in our Fourth Point. The two exceptions concerning selvedges (fo. 28, 31) are therefore without importance.

The further ruling of the Court as to the meaning of the *thread* clause is considered under our Third Point.

Second Point.

The Court below committed no error in excluding proof and in disregarding motions concerning the possible contention that these goods were "*all-wool*," or "*substantially of wool*" or "*known to trade and commerce as all-wool.*"

See six exceptions, fo. 27, 27, 27, 29, 31, 32.

FIRST.—The learned Solicitor-General repeatedly refers to clause D as though it employed the words "*all-wool.*"

This is clearly a misapprehension.

The statute does not employ the phrase "*all-wool*" at all; neither does it employ any phrase in a technical sense. It employs ordinary language, that by its own force describes the condition of the subject to which it relates. The language is clearly "*descriptive*" and not "*denominative.*"

It places a low rate of duty on goods "*composed in part*" of wool.

It places a higher rate of duty on goods "*composed wholly*" of wool.

All goods containing wool must therefore belong to one or the other of these two classes. They must be "*wholly*" of wool or "*in part*" of wool. There is no intermediate state.

It was, therefore, of no consequence how these goods were known popularly or in trade and commerce.

SECOND.—As these goods were not *wholly of wool*, no proportion of wool, however preponderant, could take them out of the description "composed *in part* of wool."

See decision Judge BLODGETT,
Seeberger v. *Farwell*, Record, 1441;
And MS. decision Judge COLT,
Claflin v. *Saltonstall* (Mass. Dist., 25th Jany., 1889).

Third Point.

The Court below committed no error prejudicial to government in submitting to the jury the question whether these goods contained A THREAD of material other than wool, and in declining to recognize a compound thread of wool and cotton as a thread of material other than wool.

See four exceptions, fo. 28, 29, 30, 31.

FIRST.—The exception as to goods with "*threads of other materials*" is embraced under the very same relative "*such*" as is the exception as to goods "*with selvedges, &c.,*" already considered. This exception therefore like that, and like the *proviso* (24 Fed. Rep., 136) is limited to goods composed "wholly of wool."

This meaning of this language is such as was suggested by the testimony of Mr. Whitman, the draughtsman of the law, who said that he had in mind goods wholly of wool, save only a thread of other material introduced *between* the body of the goods and the selvedge.

This language had no reference to goods in which the body of the goods contained some cotton, but no thread of cotton.

The law here intended to exclude reference to any selvedge or thread of material other *than the body of*

the goods for the purpose of classification. No goods "*wholly of wool*" could contain "threads of other material" in the body. In such goods *ex necessitate* the foreign thread must be either in the selvedge or between the body and the selvedge. From the moment the foreign material was introduced into the body of the goods, they became goods composed only partly and not wholly of wool, and clause E had no proper application in respect of them.

SECOND.—Inasmuch as the goods contained both wool and cotton, but nothing else; and inasmuch as (fo. 25) "*no separate, single, distinct, continuous thread of cotton existed*" in the goods, the Court correctly disregarded (fo. 30–31) all the government's points as to compound "*threads composed of wool and cotton.*"

The exception concerns wholly woolen goods not "*with other materials* introduced, &c," but "with *threads* of other materials introduced, &c."

Unless, therefore, the "*other materials*" were introduced in the form of a "*a thread*" (a proposition here negatived by the verdict of the jury) the goods were not brought within the exception.

THIRD.—But if a line of argument so attenuated as that of "a compound thread" is to be entertained at all, it may be met by a point equally fine. Every thread of the warp was such a compound thread. Without these compound threads there was no warp. Without the warp there was no cloth. This warp of compound threads was therefore an essential part of the cloth. The compound thread therefore was introduced for a necessary purpose of manufacture, *and not for the purpose of changing the classification.*

FOURTH.—Further, it may be noted that the thread specified in the statutory exception is a "thread *of other materials,*" a description not satisfied by a thread that is only *in part* of other material.

The absence of these words "*in part*" distinguish the exception in the statute *as to threads* from the exception *as to selvedges* immediately preceding.

The learned Solicitor-General sagaciously anticipated the appearance of this point, prepared before his brief was received.

His suggestien that this is an implication inadmissible because against the intention of the Legislature, is, we respectfully submit, "*petitio principii.*" At least two courts have held that by this language Congressional intention is disclosed in harmony with defendant's interpretation.

FIFTH.—The contention of the plaintiff in error as to the rulings concerning a thread may, therefore, be disregarded.

Fourth Point.

The Court below committed no error in overruling the contention of government that the selvedges of these goods were such as to subject them to the higher rate of duty.

See exceptions, fo. 28, 31.

FIRST.—The ruling of the Court was right upon mere consideration of the law itself (fo. 30) as already discussed (*supra*, Point I.).

SECOND.—But as matter of fact also the disposition of the case was right. "The selvedges of these "goods were formed from the warp threads of the "goods drawn together in a dent, and * * * "composed of wool and cotton in the same combina- "tion and extent as the warp of the goods."

That is to say, the goods had a selvedge not in the

manufacturing sense of the word—being a band or border, but in the strict literal sense a "self-edge," *not* "made wholly or in part of other materials" than the body of the goods.

This mere knotting together of the ends of the warp threads did not, as was shown by the testimony of Mr. Whitman, constitute a selvedge within the meaning of the law.

The learned Solicitor-General quite properly observes that "Congress intended to tax the body of "the cloth, and the duty was made to depend on "its texture and not upon that of its selvedge."

Fifth Point.

The Court committed no error in holding (fo. 30) that the importers were not prohibited from so manufacturing goods as to conform to a lower rather than a higher exaction of the tariff, and though they may have adopted a very technical device to escape the higher rate, the question presented by the case is only whether their goods are embraced within the higher rate, and is not whether the plaintiffs have evaded the law.

FIRST.—The language of the charge is exactly in the line of the opinion of Judge BLODGETT in the other case upon the same section (*Seeberger* v. *Farwell*), argued at the same time with this.

It is also fully sustained by many decisions.

U. S. v. *Isham*, 17 Wall (84 U. S.), 496–506.

Merritt v. *Walsh*, 14 Otto (104 U. S.), 694–701.

People v. *Ryan*, 88 N. Y., 142.

SECOND.—Besides, there was here no case of "evasion."

The goods were mixed goods and therefore admissible at the lower rate. The statutory exceptions as to goods wholly of wool, with threads or selvedges of other material, were obviously insufficient to take these mixed goods out of the lower duty class. Therefore, the importers making these mixed goods without adopting any of the excepted devices, were entitled to enter them at the lower rate, and are not subject to the strained and arbitrary interpretation given to the statute by the Customs officers (*Hartranft* v. *Wiegman*, 121 U. S., 609-617).

Sixth Point.

The judgment below should be affirmed.

Dated March 28, 1891.

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